

Introduction

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We have a distinguished panel of experts addressing issues associated with collateral damage. That general rubric would include issues that are dealt with in Protocol I, referred to as excessive civilian damage in attacks on otherwise lawful targets, and issues regarding feasible precautions in attacking.

I have three brief points that I would like to put before us before turning to the panelists. The first is for us to consider just how far we have come in relation to the systematic inclusion of the laws of war in military operations and to reflect for a moment on the creation of the field called operational law in the United States. As I think everyone in this room knows full well, the United States and particularly the US military had a sorry experience in Vietnam. When the war was over and we looked back and sought to look at the lessons learned about Vietnam, a number of things emerged that were very important in relation to the laws of war. The first of those is that we had not trained as adequately in the laws of war as we should have. The result was a My Lai which had enormous cost for the United States in that war. We also found that one of the problems was a series of areas of advice given and constraints placed on the United States military ostensibly designed for ethical and law of war reasons, but in fact uninformed about proper targeting and correct operation of the law of war. The result was a series of inhibitions that were not required by the law of war and which dramatically stretched out the war and perhaps in the end cost the United States the war in Vietnam.

After Vietnam there was a review, led for the most part by the US military, that said in effect "We're going to have to in the future have a cadre of people that are extraordinarily well trained in the law of war so that we won't be

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making the mistakes on either side of this equation—either unnecessarily prohibiting targeting that is essential for warfighting, or on the other hand not controlling activities that are violations of the laws of war.” The result has been an extraordinary input of good legal advice regarding US military activities. Indeed I think we can say that the first real test of this came during the Gulf War in which we saw extremely careful vetting of virtually every target with equal emphasis on both sides of the equation—permitting effective warfighting on the one hand, and on the other hand preventing problems that could be serious humanitarian violations that would undermine the war effort.

It seems to me that the same thing has happened again in Kosovo. As we put this in perspective, the real starting point is to notice that there has never been a military campaign in the history of the world that has had such a careful input and consideration of targeting, proportionality and all of the other issues than in the Gulf War and again in the Kosovo operation under NATO. It is a sea change.

My second point is that while this colloquium is quite properly focused on the issue of lessons from the NATO campaign in Kosovo, let us at least remind ourselves that there is—quite apart from NATO activities—a very serious enforcement problem in relation to massive noncompliance with the laws of war by the opponents that we were facing. We can go all the way back to Vietnam and the massive violations of the laws of war by North Vietnam, not unintended by the government as in the case of My Lai, which was carried out by an out-of-control second lieutenant who was poorly trained. We saw the same problem in Bosnia with the slaughter of people in that conflict. We saw it in Kosovo, and we saw it in Rwanda. It has not gone away. It is still with us in the modern world. So one of the jobs for us as academics and members of the government and those that are interested seriously in humanitarian law is never to forget that we have a fundamental enforcement problem in relation to the non-democratic governments that are still committing democide, genocide and other massive insults in relation to the laws of war.

The third and final context point I would like to make is simply to remind us that as with all law, the laws of war are intended to serve important goals. They must be judged in the end by their effectiveness in serving those goals. In this context of the laws of war, all of us know that there is in fact a careful balance that has to be met. For a variety of ethical, moral and other reasons we want to make sure that we protect against unnecessary and excessive damage. All of us are very aware of principles of discrimination, of proportionality, of avoidance of unnecessary suffering and other important principles of the laws of war that lead in that direction. Let me just suggest that there is another

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critical reason for democracies to support such laws. That is for democracies it is essential that they comply with humanitarian objectives in wartime. To fail to do that has extraordinary cost for the democracies and the entire political-military effort. If we learned anything from the Vietnam context, it is the great importance of democracies fighting wars in strict compliance with humanitarian objectives.

There is another consideration that makes the issue far more complex and far more difficult because we also learned in the Vietnam context that excessive constraints can be highly costly. If all we had was the one side of the equation, it would be tempting simply to say that we can always keep placing more and more constraints on the warfighting effort. Unfortunately we know in the real world that if we place too many constraints on that effort it will have costs that will undermine the very goals that we seek to support through the laws of war. We can endanger our own military when we have constraints that are too great. In addition, we may end up prolonging the war—mitigating the shock value necessary to promptly end the conflict—and as a consequence end up with many, many more combatants and civilians killed than if the war had been properly fought and ended at an early time.

I was the Counselor on International Law to the US Department of State during the Vietnam War and I witnessed with great interest what happened in a three-week period when the President of the United States, President Nixon, suddenly decided to fight the war the proper way—not by violating the laws of war or engaging in carpet bombing or anything of that sort—but instead by doing what the Joint Chiefs had suggested that he do many years before. He simply mined Haiphong Harbor, which as far as I know had zero casualties on all sides but suddenly prevented 90% to 95% of all the importation of war supplies into North Vietnam. In addition to that, he carried out the “Christmas” bombing, which was not an area bombing of Hanoi or Haiphong, but was instead a careful attack on rail lines in the Hanoi area. The result was North Vietnam came to the table for the first time in the entire history of the war seriously seeking the end of the war. Within three weeks, the Paris accords were agreed and the United States decided the war was over and came home. The point is this could have been done at any point in the preceding years of the war and casualties on all sides would have been reduced very dramatically.

There is yet another problem if the constraints are too excessive. At some point if the cost of war fighting by the democracies in resisting aggression, genocide and democide is too high, we will in fact discourage the democracies from undertaking those efforts. That of course in the end is what happened in

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Vietnam when the United States finally came home. The other party then simply had a regular army invasion of the south and the result was a bloodbath, which we now know resulted in at least one hundred thousand killed in the south, a million boat people, with a half million dying at sea, and somewhere between one and three million dying in Cambodia. So what we do in relation to advice on the laws of war is important in terms of the real world and real human lives and real effectiveness in preventing aggression, stopping aggression and in fact stopping genocide as well. I simply place these points in front of you as context as we move forward to our discussion on collateral damage.